

REMARKS

In an Election Requirement dated February 16, 2006, the Examiner required election under 35 U.S.C. § 121 between a first species allegedly directed to claims 1-9 and 26-34 and a second species allegedly directed to claims 10-25. Applicants respectfully traverse this Election Requirement for the reasons provided below.

Where two or more species or embodiments are claimed, a requirement for restriction to a single species may be proper if the species are mutually exclusive. MPEP § 806.04(f). Identification of species in a restriction requirement should be made with respect to figures and not claims. See MPEP § 809.02(a)(B). This is based on the fact that claims are never species but are rather definitions of the invention. MPEP § 806.04(e). Accordingly, Applicants submit that an Election Requirement that identifies allegedly distinct species by way of claims is improper.

Applicants respectfully traverse the outstanding Election Requirement because it improperly identifies the allegedly distinct species with respect to claims of the application rather than figures of the application. As noted above and as clearly explained in the MPEP, species should be identified by way of figures, not claims of the application. The outstanding Election Requirement supports Applicants' position by requesting that Applicant provide "an identification of the species that is elected...and a listing of all claims readable thereon." Election Requirement at page 2 (emphasis added). If the species were properly identifiable by claims, there would be no need to provide a list of claims readable on the elected species.


In view of the above, Applicants elect the embodiment disclosed in Fig. 5 of the application. Claims 1-34 read on the embodiment of Fig. 5. Claims 1-9, 26, 27, and 30 are generic to each of the embodiments shown in the figures.

Applicants' election of the embodiment of Fig. 5 assumes that the outstanding Election Requirement was intended to be a request for an election of a species, rather than a restriction requirement between claims of the application based on patentable distinctness. If this assumption is incorrect, Applicants respectfully request that a new restriction requirement be issued including the appropriate justification supporting any restriction between claims.

Respectfully submitted,

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Dated: March 16, 2006

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